No. 85-6790

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WALDO E. GRANBERRY,

Petitioner,

-vs-

JIM GREER, Warden,

Respondent.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROMA J. STEWART
Solicitor General
State of Illinois

MARK L. ROTERT

TERENCE M. MADSEN
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570

*COUNSEL OF RECORD

QUESTIONS PRESENTED

1. Whether this Court should expend its valuable time and resources to resolve a procedural question which is consistent with the rule of the majority of the circuits and this Court's opinion in Rose v. Lundy, when petitioner cannot prevail on the merits as a result of a decision by the United States Court of Appeals for the Seventh Circuit which overruled the authority relied on in the petition as the basis for the claim for relief?

2. Whether petitioner has exhausted his available state court remedies?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the Court of Appeals is reproduced as petitioner's Appendix A.

JURISDICTION

Petitioner properly invokes this Court's jurisdiction pursuant to 18 U.S.C. §1254. However, as treated more fully below, respondent submits that no good reason exists for this Court to exercise its sound judicial discretion and grant the petition for a writ of certiorari.

STATEMENT OF FACTS

The opinion of the Court of Appeals adequately sets forth the facts necessary for the resolution of this opinion.

REASONS FOR DENYING THE WRIT

I.

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS CONSISTENT WITH THE RULE IN THE MAJORITY OF CIRCUITS AND WITH THIS COURT'S OPINION IN ROSE V. LUNDY.

Pursuant to 28 U.S.C. §2254(b), a state prisoner must exhaust available state court remedies before seeking habeas corpus relief in federal court.

In Mattes v. Gagnon, 700 F.2d 1096, 1098 n. 1 (7th Cir. 1983), the court explained the impact of §2254(b) in combination with this Court's instruction on exhaustion:

> Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), holds "that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." Id. at 515, 102 S.Ct. at 1206. Thus, at the outset, the court must consider whether the petitioner succeeded in exhausting his state remedies as required by 28 U.S.C. §2254(b) (1976), although the parties do not raise the question.

This position formed the basis for the opinion below and is consistent with a majority of the circuits. See Needel v. Scafati, 412 F.2d 761 (1st Cir.) cert. denied, 396 U.S. 861 (1969); United States ex rel. Trantino v. Hatrick, 563 F.2d 86 (3rd Cir. 1977), cert. denied, 435 U.S. 928 (1978); Bowen v. Tennessee, 698 F.2d 241 (6th Cir) (en banc), cert. denied, 463 U.S. 1212 (1983); Mattes, supra; 3atchelor v. Cupp, 693 F.2d 859 (9th Cir. 1982); Naranjo v. Ricketts, 696 F.2d 83 (10th Cir. 1982). Cf. Silverstein v. Henderson, 706 F.2d 361, 365 n.9 (2nd Cir.), cert. denied 464 U.S. 864 (1983) (court places "no weight" on State's failure to assert exhaustion defense because "the state executive branch may not ordinarily have the power to waive the deference due state courts") But see Jenkins v. Fitzberger, 440 F.2d 1188 (4th Cir. 1971) (state may explicitly waive exnaustion); McGee v. Estelle, 722 F.2d 1206 (5th Cir. 1984); Purnell v. Missouri Department of Corrections, 753 F.2d 703 (8th Cir. 1985); Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983) (holding that the state may waive non-exhaustion.).

The majority position is clearly correct. As the court explained in Trantino, supra, well before this Court's decision in Rose;

> The basis for rejection of the concept of waiver in this case * * * is found in the policy underlying the exhaustion requirement. Exhaustion is a rule of comity. "Comity," in this context, is that measure of deference and consideration that the federal judiciary must afford to the coequal judicial systems of the various states. Exhaustion, then, serves an interest not of state prosecutors but of state courts. It follows, therefore, that the state court interest which underlies the exhaustion requirement of §2254(b) cannot be conceded or waived by state prosecutors - for the state court interest in having "an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights" is simply not an interest that state prosecutors have been empowered to yield. "Waiver," like "concession," is not a talisman, the incantation of which will cause the exhaustion requirement to disappear. That requirement remains.

Trantino, 563 F.2d at 96.

Petitioner's assertion that the Attorney General is the chief legal officer of the state and, therefore, empowered to represent the interests of the judiciary does not detract from this principle. In a Section 2254 proceeding, brought by an inmate in custody, the Attorney General represents a specific custodian whose authority to detain the inmate has been challenged. Advancing or protecting the interests of that "client" does not convey authority to waive interests of other officers or agencies the Attorney General may also be empowered to represent, without more.

Clearly, the requirement of sua sponte consideration of exhaustion is consistent with this Court's teaching in Rose. Moreover, this requirement does not technically equate the exhaustion rule to a rule of subject matter jurisdiction but, following Rose, the rules do carry similar effects:

> Exhaustion is not purely jurisdictional because federal courts are granted subject matter jurisdiction to hear habeas corpus claims from state prisoners by 28 U.S.C. §2241(c)(3) (1976). 28 U.S.C. §§2254(b) and (c) (1976), however, limit the relief a district court may grant to those

> "applications" that present only exhausted claims. See supra text at 1533. Sections 2254(b) and (c) also narrowly define which claims may be deemed exhausted. The Supreme Court has given this statute a literal interpretation, to give full effect to the policies Congress sought to enforce. Because no two litigants may stipulate to a district court's entertaining a habeas petition when the petition does not satisfy section 2254 and Rose, the exhaustion doctrine must be viewed as quasi-jurisdicitional.

Darden v. Wainwright, 725 F.2d 1526, 1544 (11th Cir. 1984) (Tjoflat, J., dissenting)).

The panel in this case has correctly determined the exhaustion issue and their decision should not be disturbed.

II.

EVEN IF PETITIONER PREVAILS ON THE PROCEDURAL ISSUE IN THIS COURT HE CANNOT PREVAIL ON THE MERITS.

Petitioner brought this action in the United States District Court for the Southern District of Illinois in 1983. (The Magistrate's Report is Appended to the petition.) The magistrate interpreted the petition as raising one claim:

> [t]he Board retroactively applied the general deterrence paroling criterion to deny parole until Welsn v. Mizell when the Board began switching rationales, capriciously and arbitrarily. The last parole denial rationale was in the "best interest of society" which, in the context of prior denials, is a re-phrasing of the prohibited general deterrence parole criterion in this case.

(Pet. App. 3, at 2)

While the petition was pending, Welsh was specifically overruled in Heirens v. Mizell, 729 F.2d 449 (7th Cir.), cert. denied, ___ U.S. ___, 105 S.Ct. 147 (1984). The petition was denied on the basis of Heirens. (App. at 2) Heirens remains the controlling precedent in the Circuit.

As a result, short of convincing the Seventh Circuit that it was wrong when it decided in Heirens that it had been wrong when it decided Welsh, the petitioner has no possibility of ultimately prevailing regardless of what this Honorable Court decides with regard to the procedural issue.

III.

PETITIONER HAS NOT EXHAUSTED HIS AVAILABLE STATE COURT REMEDIES.

In United States ex rel. Johnson v. McGinnis, 734 F.2d 1198 (7th Cir. 1984) the court required Illinois petitioners to return to state court to challenge the sufficiency of parole denial rationales in a proceeding for a writ of mandamus. One of the claims raised by petitioner's appointed counsel on appeal in this case is identical to the claim of Johnson.

The only difference between the petitioner in Johnson and the petitioner here is that petitioner in this case did seek a writ of mandamus in the Illinois Supreme Court. In a recent similar case Chief Judge McGarr of the Northern District of Illinois discussed satisfaction of the exhaustion requirement with a view toward the nature of Illinois' remedies:

> To exhaust state remedies under 28 U.S.C. §2254(b), a state prisoner must give the state courts a fair opportunity to address the claimed violations of his federal constitutional rights. Toney v. Franzen, 687 F.2d 1016, 1021 (7th Cir. 1982). Generally, the prisoner must follow the normal appellate or post-conviction procedural routes for pursuing her claim through the state courts. Carter v. Estelle, 677 F.2d 427, 443 (5th Cir. 1982), cert. denied, 460 U.S. 1056 (1983). Thus, a state supreme court's denial of a petition for an extraordinary writ does not satisfy the exhaustion requirement where denial did not constitute an adjudication on the merits of the issues presented, and where other more appropriate state remedies are available. Pitchess v. Davis, 421 U.S. 482, 488 (1975); Granberry ...

United States ex rel. Rabb Ra Chaka v. Lane, 86 C 57 (N.D. Ill. 1/27/86 (appended hereto)) (Slip Op. at 3).

The importance of procedural integrity in efforts to satisfy the exhaustion requirement is exemplified by the nature of the writ of mandamus in the Illinois Supreme Court:

> The superior Court of Cook County and this court do not exercise concurrent jurisdiction in mandamus. The superior court exercises such jurisdiction generally, but the exercise of the jurisdiction by this court is discretionary, and the court will assume jurisdiction in cases only where there is a special reason and the remedy in the trial court is ineffective...

People v. Lueders, 287 Ill. 107, 112, 122 N.E. 374 (1919).

The denial of leave to file a petition for writ of mandamus in the Illinois Supreme Court is not an adjudication on the merits and it is not a refusal by the state judiciary to consider a claim.

In Illinois, a "fair opportunity" to review the issues is not satisfied by seeking a discretionary extraordinary writ in the Supreme Court. This Court should not allow inmates to circumvent the requirement that state courts have the first opportunity to consider their claims by accepting as "exhaustion" the presentation of a petition for leave to file which will not be granted but which is likely to be denied in much less time than a circuit court could meaningfully address the merits of his claim. He should be required to follow the usual procedures by seeking his relief in a court of general jurisdiction.1/

Finally, petitioner's argument that Harris v. Irving, 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980), renders futile exhaustion of his ex post facto claim is of no impact, whatsoever, on the question of exhaustion of his arbitrariness claim in this mixed petition.

This Court should reject petitioner's invitation to review this case which will not ultimately benefit petitioner and which comes to this Court burdened with the load of collateral issues involving the nature of Illinois remedies and possible mootness.

1/ Respondent notes that if petitioner has continued to receive annual hearings the challenge to the specific 1983 rationale may now be moot as the result of subsequent rationales.

C O N C L U S I O N

For all of the foregoing reasons, respondent asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROMA J. STEWART
Solicitor General
State of Illinois

MARK L. ROTERT

TERENCE M. MADSEN
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570

*COUNSEL OF RECORD

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. RABB RA CHAKA, Petitioner, v. MICHAEL P. LANE, et al., Defendants.	)	No. 86 C 57

MEMORANDUM OPINION AND ORDER

Finding petitioner indigent, the Court grants his motion for leave to file in forma pauperis. The petition for a writ of habeas corpus thus comes before the Court for preliminary consideration under Rule 4 of the Rules Governing Section 2254 Cases.

Petitioner asserts that enactment and interpretation of three statutes governing good conduct credits and parole procedures, as applied to him, violate the Ex Post Facto Clause. According to the petition, petitioner raised these grounds before the Illinois Supreme Court in an original jurisdiction habeas corpus petition. The Illinois Supreme Court denied petitione leave to file his petition in an order dated November 27, 1985. The question is whether petitioner's attempt to present his claims in a habeas corpus petition before the Illinois Supreme Court is sufficient to meet the exhaustion requirement imposed under 28 U.S.C. §§2254(b) and (c). We find that it does not.

To exhaust state remedies within the meaning of 28 U.S.C. §2254(b), a prisoner must give the state courts a fair opportunity to address the alleged violation of his constitutional rights. Toney v. Franzen, 687 F.2d 1016, 1021 (7th Cir. 1982). As a general rule, the "fair opportunity" docrine requires the prisoner to follow the normal appellate or postconviction procedural routes for pursuing his claim through the state courts. Carter v. Estelle, 677 F.2d 427, 443 (5th Cir. 1982). Thus, a state supreme court's denial of an application for an extraordinary writ does not satisfy the exhaustion requirement where the denial did not constitute an adjudication of the merits of the claim presented, and where more appropriate state remedies exist. Pitchess v. Davis, 421 U.S. 482, 488 (1975); Granberry v. Mizell, No. 84-1956, slip op. at 4 (7th Cir. Dec. 26, 1985).

The Illinois Supreme Court denied petitioner leave to file his habeas corpus petition. It did not deny the habeas petition itself. Although unclear, it would appear that the mere denial of the right to file an original jurisdiction habeas corpus petition before the Illinois Supreme Court does not constitute an adjudication on the merits. Most likely it reflects the court's preference that petitioner first pursue his habeas claims before the appropriate state circuit court. Although Ill.Rev.Stat. 1983, ch. 110, §10-103

delegates concurrent jurisdiction over habeas corpus petitions to both the Illinois Supreme Court and the state circuit courts, higher courts generally prefer that writs for extraordinary relief be first sought in the trial court. See Granberry, supra.

We need not in this case, however, attempt to devine the meaning of the order entered by the Illinois Supreme Court. Under the facts alleged, petitioner did not present a claim for state habeas corpus relief. The grounds for habeas corpus in Illinois are strictly limited by statute. Ill.Rev.Stat. 1983, ch. 110, §10-124. Not all claims of constitutional violations are cognizable under the Illinois habeas corpus statute. Hughes v. Kiley, 67 Ill. 2d 261, 266, 367 N.E.2d 700, 702 (1977). Because petitioner does not allege entitlement to complete discharge for his sentence, his challenge to the constitutionality of parole procedures and the method by which prison officials are calculating his good conduct credits does not come within one of the enumerated grounds for habeas corpus relief in Illinois courts. Therefore, his claims must be pursued by way of mandamus before the appropriate state circuit court. See Granberry; United States ex rel. Isaac v. Franzen, 531 F. Supp. 1086, 1090-91 (N.D. Ill. 1982).

Accordingly, finding that petitioner has not given the state a fair opportunity to consider his claims for federal habeas corpus relief, the Court summarily

dismisses the habeas corpus petition for lack of exhaustion.

ENTER:

Frank J. McGarr
UNITED STATES DISTRICT JUDGE

DATED: January 27, 1985

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S.A. ex rel. Rabb Ra Chaka

V.

Michael P. Lane, etc., et al.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 86 C 0057

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED on its own motion the court dismisses the petitio for writ of habeas corpus for lack of exhaustion.

January 27, 1986
Date

H. Stuart Cunningham
Clerk

Pauline Rolbo

No. 85-6790

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WALDO E. GRANBERRY,

Petitioner,

-vs-

JIM GREER, Warden,

Respondent.

CERTIFICATE OF SERVICE AND
STATEMENT OF TIMELY FILING

I, Mark L. Rotert, a member of the bar of this Court and representing Respondent in this cause, certify:

1.) That I have served ten (10) copies of the Respondent's Brief In Opposition on the below-named party, by depositing such copy in the United States mail at 100 West Randolph Street, Chicago, Illinois, with the proper postage affixed thereto, and with the envelope addressed as follows:

Joseph Spaniol, Clerk
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

2.) That all parties required to be served have been served, to wit:

Howard B. Eisenberg
104 Lesar Law Building
Southern Illinois University
Carbondale, Illinois 62901

I further state that this mailing took place on June 18, 1986, and within the time permitted for filing a brief in opposition to a petition for a writ of certiorari.

BY: Mark L. Rotert
MARK L. ROTERT
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-2570

SUBSCRIBED and SWORN to
before me this 18th day of
June, 1986.

NOTARY PUBLIC

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

Case Number: 85-6790

RECEIVED
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SUPREME COURT, U.S.

WALDO GRANBERRY,

Petitioner,

vs.

LARRY MIZELL,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner, Waldo Granberry, by his attorney, Howard B. Eisenberg, respectfully moves this Court for leave to file the Attached Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit without payment of docket or other fees, in accordance with Rule 46 of this Court. In support of this Motion, Petitioner states:

1. He is presently confined at the Vienna Correctional Institution in Vienna, Illinois;

2. The undersigned attorney was appointed by the United States Court of Appeals for the Seventh Circuit to represent Petitioner in this case under the provisions of the Criminal Justice Act of 1964; and

3. The undersigned has no reason to believe that Petitioner's financial condition has changed since he was appointed to represent Petitioner.

Dated this 22nd day of April, 1986.

Respectfully submitted,

HOWARD B. EISENBERG

104 Lesar Law Building
Southern Illinois University
School of Law
Carbondale, Illinois 62901

ATTORNEY FOR PETITIONER.